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• Robert A. Manning, Chair • Enola T. Brown, Co-Editor • Janet E. Bowman, Co-Editor •

Application of Institutional Controls for Contaminated Site Redevelopment

by Andrew Lawn

Institutional Controls (ICs) may be applied to environmentally-impaired properties as a means of moving forward with plans for site redevelopment and land re-use. ICs are restrictions on the use of, or access to, a site to eliminate or minimize exposure to contaminants. Such restrictions may include, but are not limited to deed restrictions, restrictive covenants (RCs), or conservation easements.

The use of ICs to eliminate or control potential exposure to contamination is specifically authorized in Sections 376.30701, .3071, .3078, and .81, Florida Statutes, and cited as

site assessment and cleanup closure options in Chapters 62-770, -780, -782, and -785, Florida Administrative Code (F.A.C.). Depending on site conditions, engineering controls (ECs) may be required in tandem with site-specific ICs. ECs are modifications to a site to reduce or eliminate the potential for exposure to contaminants. Modifications may include, but are not limited to physical or hydraulic control measures, capping, point of use treatments, or slurry walls.

In determining what ICs are appropriate, consideration should be given to: the medium that is contami-

nated; current and projected use of affected groundwater, surface water, and soil; use of the contaminated property and surrounding land; the nature of contamination; probability of contamination spreading; location of receptors; and availability of public water supply systems. The most common application of ICs include land use restrictions for properties with soil contamination at concentrations that exceed residential soil cleanup target levels (SCTLs) and prohibitions on groundwater withdrawals due to groundwater contamination

See "Application," page 15

Message from the Chair

by Robert A. Manning

Welcome to a new year, a new administration, and new adventures and challenges for ELULS. Your Executive Council continues to devote a great deal of time and attention to the issues and events that we understand are important to you (and by all means, please let us know if we can or need to re-direct our efforts). Jim Porter and Vivien Monaco are very active in reaching out to the Law Schools around the state, encouraging more interactions and access to/from students. Erin Deady is continuing to develop CLE functions, the latest being a January 26 event titled "Environmental & Land Use Considerations for

Real Estate Transactions" (a joint production with the Real Property, Probate and Trust Law Section) and another event in late March focusing on "Hot Topics: Projects and Cases." And hopefully you have all visited the Treatise Online (thanks to Gary Hunter, Joe Richards and others). If you are interested in publishing, Gary Oldehoff is accepting ELULS articles for the Florida Bar Journal, Enola Brown would welcome articles for the Newsletter, and Gary Hunter and David Jordan are looking for editors and authors for the treatise. I really appreciate the hard work of the Council members, and we all are very interested in your feedback.

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Florida Caselaw Update

December 2006

by Gary K. Hunter, Jr. & D. Kent Safriet

Association lacks standing to challenge DEP's denial of Corps' permit application to dredge the Apalachicola River. *Mid-Chat-tahoochee River Users v. Florida Dep't of Env'tl Protection*, 2006 WL 3371566 (Fla. 1st DCA Nov. 22, 2006)

Following DEP's denial of the U.S. Army Corps of Engineers' application for a permit to dredge the Apalachicola River, an association of public and private corporations in Alabama and Georgia (River Users) filed a petition for an administrative hearing challenging the denial. The Corps did not file a challenge. While the River Users generally alleged that they would suffer immediate harm because some members intended to ship items on the River in the future, the real harm was economic in nature. The River Users alleged that having the ability to ship items on the River provided a basis to negotiate more favorable terms for other modes of transportation (e.g., rail and trucking).

DEP dismissed the petition for lack of standing and the River Users appealed. On appeal, the First District Court affirmed the Final Order holding that the alleged economic injury failed the second prong of the *Agrico Chem. Co. v. Dep't of Env'tl Reg.*, 406 So.2d 478 (Fla. 2d DCA 1981), standing test which requires that the sub-

stantial injury complained of be "of the type or nature that the proceeding is designed to protect." In this case, the court determined that the interest protected by a proceeding for a wetland resource permit under Chapter 373, F.S., does not include economic impacts. The Court summarized that the "intent of *Agrico* was to preclude parties from intervening in a proceeding where those parties' substantial interest are totally unrelated to the issues to be resolved in the administrative proceedings." Accordingly, the Court concluded "that economic injury is not the type of injury that the permitting proceeding under Chapter 373 was designed to protect."

City Charter amendments that, if adopted by the electorate, would require voter approval for certain changes to the City's land use and community development plans were not preempted by Chapter 163, F.S. *Citizens for Responsible Growth v. City of St. Pete Beach*, 31 Fla. L. Weekly D2196 (Fla. 2d DCA Aug. 18, 2006)

Citizens for Responsible Growth ("Citizens") collected the requisite number of signatures to place four proposed amendments to the City Charter on the ballot for approval by the electorate. The four amend-

ments would require: 1) that a comprehensive plan or comprehensive plan amendment that affects 6 or more parcels be approved by the electorate in a referendum; 2) unanimous city commission approval of a comprehensive plan or comprehensive plan amendment that affects 5 or fewer parcels; 3) a community redevelopment plan, as defined in Section 163, F.S., be submitted to a referendum; and 4) any amendment to the City's land development code that increases allowable height restrictions also be submitted to a referendum.

Instead of placing the four proposed amendments on the ballot, the City filed an action for declaratory judgment asserting that the amendments were preempted by Chapter 163, F.S. On cross-appeal from the circuit court's order holding three of the four amendments unconstitutional, the District Court found that all four amendments were proper and should have been allowed on the ballot. The City argued that the second proposed amendment was an improper "referendum" prohibited by Section 163.3167(12), F.S., which forbids referendums with respect to comprehensive plans or comprehensive plan amendments that affect 5 or fewer parcels. The Court held that the procedural requirement requiring unanimous vote of the commission is not a prohibited "referendum."

With respect to the other three proposed amendments, the Court found that they were not preempted by Chapter 163, F.S., because the amendments could co-exist with the statutory framework. Finally, the Court, refusing to pass upon the wisdom of the amendments, noted that the third and fourth proposed amendments appeared to be advisory in nature rather than mandatory.

Nuisance Abatement Board violated due process by limiting ability to present evidence to support a defense. *Powell v. City of Sarasota*, 31 Fla. L. Weekly D2349 (Fla. 2d DCA Sept. 13, 2006).

The Powells, owners of several rental units in the City of Sarasota,

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Robert A. Manning, Tallahassee Chair
Michelle Diffenderfer, West Palm Beach Chair-elect
Gary K. Hunter, Tallahassee Secretary
Paul H. Chipok, Orlando Treasurer
Enola T. Brown, Tampa Co-Editor
Janet E. Bowman, Tallahassee Co-Editor
Colleen Bellia, Tallahassee Production Artist
Jackie Werndli, Tallahassee Section Administrator

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were cited for allowing a public nuisance at one of their properties as a result of three “controlled” drug buys by the City Police Department. After the controlled drug buys, the Police executed a search warrant on the property but did not find evidence of any drugs. The Powells were not informed of the anonymous complaints received by the Police concerning the drug activity until after the execution of the search warrant.

At the Nuisance Abatement Board hearing, the Powells attempted to present evidence in support of their defense of selective enforcement arguing that the City’s nuisance abatement efforts were targeting primarily African-American neighborhoods. The Board refused to hear the evidence or allow a proffer of the excluded evidence. The circuit court rejected the Powells’ claim that they were denied due process. On certiorari review, the District Court quashed the Board’s order, finding that the Board failed to comply with Section 893.138(3), F.S., which states that the property owner “shall have an opportunity to present evidence in his or her defense.” Because the equal protection clause forbids selective enforcement of laws based on race, the Powells were legally entitled to present evidence in support of their defense.

A development order is “rendered” for purpose of the 30-day time period to challenge a development order under Section 163.3215, F.S., when the City Clerk enters the order, not when the Mayor signs the order. 5220 Biscayne Boulevard, LLC v. Stebbins, 31 Fla. L. Weekly D2358 (Fla. 3d DCA Sept. 13, 2006)

A developer applied for a development order (in this case a major use special permit) from the City of Miami to construct a high-rise condominium. The City Commission approved the development order at its December 15, 2005 meeting. The Mayor signed the development order on December 20, 2005, and it was recorded by the City Clerk on December 21, 2005. Pursuant to Section 163.3215, F.S., Stebbins, inter alia, filed a complaint on January 20, 2006 (31 days after the Mayor signed the order and 30 days after it was recorded), alleging that the development order was inconsistent with the comprehensive plan.

The City moved to dismiss arguing that the challenge was filed 31 days after its “rendition.” Following denial of the motion by the circuit court, the City sought a writ of prohibition from the District Court. Section 163.3215, F.S., was amended in 2002 to provide that a complaint “must be filed no later than 30 days following the rendition of a development order.”

In construing this provision, the District Court held that the term “rendition” should be calculated in accordance with the Florida Rules of Appellate Procedure as indicated by the legislative history. Accordingly, pursuant to Rule 9.020(h), Fla. R. App. P., an order is rendered when the signed order is filed with the clerk of the lower tribunal. In the context of Section 163.3215, F.S., a development order is rendered when the final signed order is filed with the clerk. Accordingly, the District Court denied the City’s writ of prohibition finding the complaint was timely filed.

An expert may not testify on direct examination that he or she relied upon consultation with other experts to form his or her opinion. Linn v. Fossum, 31 Fla. L. Weekly S741 (Fla. Nov. 2, 2006).

Although a medical malpractice case, the rule of law clarified in this case is equally important to land use practitioners who utilize experts to testify in administrative and judicial proceedings. In this case, the expert doctor testified that the defendant doctor complied with the prevailing professional standard of care. The ba-

sis of this expert’s opinion was several “curb-side” conferences with other doctors she regarded as representative of the medical community. None of the doctors to whom the expert doctor “consulted” testified.

On appeal, the Supreme Court held that the expert’s opinion testimony was inadmissible because “it impermissibly permits the testifying experts to bolster their opinions and creates the danger that testifying experts will serve as conduits for the opinions of others who are not subject to cross-examination.” *Id.* at S741.

The Court noted specifically that its opinion does not in any way preclude an expert from relying on “facts or data” that are not otherwise admissible if the facts and data are a type reasonably relied upon by experts in the field.” *Id.* In summary, the Court stated “[w]e hold as a matter of law that under the Florida Evidence Code an expert is not permitted to testify on direct examination that the expert relied on consultations with colleagues or other experts in reaching his or her opinion.” *Id.* at S743.

Gary K. Hunter, Jr. is a Shareholder with Hopping Green & Sams, P.A. in Tallahassee, Florida. He received his B.B.A. and J.D. from the University of Georgia.

D. Kent Safriet is an Associate with Hopping Green & Sams, P.A. in Tallahassee, Florida. He received his B.S. from Clemson University and his J.D. from the University of South Carolina.

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On Appeal

by Stacy Watson May, Lawrence E. Sellers, Jr., and Susan L. Stephens

Note: Status of cases is as of December 8, 2006. Readers are encouraged to advise the authors of pending appeals that should be included.

FLORIDA SUPREME COURT

Best Diversified, Inc., and Peter L. Huff, et al. v. Osceola County, et al. v., Case Nos. SC06-1823. Petition to review decision of Fifth DCA reversing award of damages for inverse condemnation under the Bert J. Harris Jr. Private Property Rights Protection Act to owner and operator of a construction and demolition debris landfill that was denied permits to continue operating the landfill due to residents' complaints and DEP's finding that the operation constituted a public nuisance. 31 Fla. L. Weekly D2143. Status: Petition denied on December 4.

Brevard County v. Stack, Case No. SC06-1616. Petition to review decision of the Fifth DCA rejecting County's arguments that the Bert J. Harris, Jr., Act is unconstitutional. 932 So.2d 1258. Status: Jurisdictional briefs have been filed.

Florida Department of Environmental Protection, et al. v. Save Our Beaches, Inc, et al., Case No. SC06-1447 and 1449. Petition to review decision of First DCA relating to DEP's final order allowing the renourishment of 6.9 miles of beaches and dunes within the City of Destin and Walton County. 31 Fla. L. Weekly D1173. The First DCA certified as question of great public importance whether the Beach and Shore Preservation Act (Part I of Chapter 161) has been applied unconstitutionally so as to deprive the members of Stop the Beach Renourishment, Inc. of their riparian rights without just compensation for the property taken, so that the exception provided in Rule 18-21.004(3), F.A.C., exempting satisfactory evidence of sufficient upland interest if the activities do not unreasonably infringe on riparian rights, does not apply. Status: Petition granted; reply brief due December 19.

FIRST DCA

Florida Hometown Democracy, Inc., et al. v. Sue M. Cobb, in her official capacity as Florida Secretary of State, Case No. 1D06-5059. Appeal of summary judgment entered in favor of the defendant. Plaintiff sought to invalidate constitutional amendment, based on Senate Joint Resolution 2394, which limits summaries imposed on citizen initiatives. Status: Notice of appeal filed September 29.

Association of Florida Community Developers v. DEP, Case No. 1D06-1425. Appeal of final order rejecting challenge to DEP's so-called Water Reservation Rule. Status: Affirmed on December 12.

Florida Petroleum Marketers and Convenience Store Association v. DEP, Case No. 1D06-817. Appeal of final order granting attorneys fees on the basis that DEP was not "substantially justified" in promulgating the contamination notification requirements in Rule 62-770(3)(b) and (4), F.A.C. Status: Affirmed per curiam on October 30.

SECOND DCA

Peninsular Properties Braden River, et al. v. City of Bradenton, Florida, Case No. 2D06-5302. Appeal of the lower court's dismissal of petition as untimely. The petition for review of the City of Bradenton's denial of petitioners' Mira Isles project was filed fifty-one days later, rather than the jurisdictional thirty-day timeframe for seeking judicial review of local government action. The trial court determined it was without jurisdiction to rule on the merits of the petition. Status: Notice of Appeal filed November 20.

THIRD DCA

Florida Keys Citizens Coalition, Inc., et al., vs. Florida Administration Commission, et al., Case No. 3D05-1800. Appeal from final order of Division of Administrative Hearings finding that proposed Florida Administrative Code rules regarding the comprehensive plans of Monroe

County and the City of Marathon are not invalid exercises of delegated legislative authority. Status: Affirmed per opinion on November 15; motion for clarification, rehearing, rehearing *en banc* filed November 30.

FOURTH DCA

1000 Friends of Florida, et al. v. DCA, Case No. 4D05-2068. Appeal of final order determining that proposed amendments to Palm Beach County comprehensive plan to accommodate the proposed Scripps biomedical campus are in compliance. Status: Response to Court's Order requesting status of Ordinances 2004-34 to 2004-39 and 2004-63 to 2004-64 and whether appeal is moot, filed June 5; jurisdiction relinquished to the Department of Community Affairs on July 12 (for 120 days); joint status report filed November 27 (recommending case remain with the DCA through October 15, 2007).

FIFTH DCA

Alfred J. Trepanier, Successor Trustee, et al. v. County of Volusia, Florida, Case No. 5D05-3892. Appeal by owners of oceanfront property from a summary judgment in favor of the County. The owners had sued the County for allowing (and directing) the public to park on property they claim they own. Status: Oral argument held November 7.

Volusia County School Board v. Volusia Home Builders Association, Inc., Case No. 5D05-3535. Appeal of an administrative ruling that the School Board's recommendation to the Volusia County Council to increase the school impact fee constituted either the enactment of a rule or the amendment of a pre-existing rule. Status: Held that the recommendation to increase the impact fee was neither a rule nor an amendment and that the Volusia Home Builders Association lacked standing to challenge the recommendation; motion for rehearing or clarification/motion for rehearing *en banc* filed December 4.

continued...

ON APPEAL

from page 5

U.S. SUPREME COURT

Baccarat Fremont Developers LLC v. U.S. Army Corps of Engineers, Case No. 06-619. Petition for review of Ninth Circuit ruling that the Corps does not need “significant hydrological and ecological connection” between wetlands and adjoining streams to exert authority (425 F.3d 1150), in light of Justice Kennedy’s concurring opinion in the *Rapanos* case, which also addressed the issue of wetlands jurisdiction. [Author’s Note: The *Rapanos* case (126 S.Ct. 2208) was decided on June 19, 2006, and is summarized in this column in the October 2006 issue of the *Reporter*.] Status: Petition filed November 1.

United States v. Atlantic Research Corp., Case No. 06-562. Petition to review an Eighth Circuit decision finding an implied right to contribution under Section 107(a) of CERCLA. 459 F.3d 827 (8th Cir. 2006). Status: Petition filed October 24.

EPA v. Defenders of Wildlife, Case No. 06-549. Request for review of a Ninth Circuit finding that EPA violated the Endangered Species Act by not consulting with the U.S. Fish and Wildlife Service when granting NPDES permitting authority to Arizona under Section 402(b) of the Clean Water Act. 420 F.3d 946 (9th Cir. 2005). Status: Petition filed October 23; various amicus briefs filed.

D. C. Water and Sewer Authority v. Friends of the Earth, Inc., Case No. 06-119. Petition to review a D.C. Circuit ruling that the word “daily” in the phrase “total maximum daily loads” (TMDL) in the CWA means “every day” under the plain language of the statute. Status: Petition filed July 21; response time extended to October 25.

W.R. Grace & Co., et al. v. United States, Case No. 05-1363. Petition to review a Ninth Circuit decision finding mine owners liable under CERCLA for cleanup costs incurred responding to contamination from mining operations. 429 F.3d 1224, 61 ERC 1865 (9th Cir., 2005). Status: Petition denied October 10.

United Haulers Association, Inc., et al. v. Oneida-Herkimer Solid Waste Management Authority, et al., Case No. 05-1345. Petition to review a Second Circuit decision holding that a

local flow-control ordinance did not violate the Commerce Clause and that any burden on commerce imposed by the ordinance is “insubstantial” and not excessive. 438 F.3d 150 (2nd Cir. 2006). Status: Oral argument scheduled for January 8, 2007.

Massachusetts v. EPA, Case No. 05-1120. Review of a D.C. Circuit decision that EPA did not violate the CAA in declining to regulate carbon dioxide emissions (*i.e.*, “greenhouse gases”) from automobiles. 415 F.3d 50, 60 (D.C. Cir. 2005). Status: Oral argument held November 29.

Environmental Defense v. Duke Energy Corp., Case No. 05-848. Review of Fourth Circuit decision narrowing the scope of the New Source Review/Prevention of Significant Deterioration (NSR/PSD) air pollution construction permitting program under the Clean Air Act (CAA) to require EPA to interpret an emissions increase that triggers NSR/PSD requirements as an increase in the maximum hourly emissions rate of a plant rather than as an increase in actual annual emissions. This effectively ended the enforcement action brought against Duke Energy. 411 F.3d 539, 60 ERC 1577 (4th Cir. 2005). Status: Oral argument held November 1.

FIRST CIRCUIT

United States v. Johnson, Case No. 05-1444. Appeal of a district court ruling that the Johnsons (Massachusetts cranberry growers) had violated the Clean Water Act by discharging dredged and fill material into wetlands without a permit. The First Circuit originally upheld the district court’s summary judgment in favor of the government (437 F.3d 157), but subsequently agreed to rehear the case after the Supreme Court ruled in *Rapanos*, which also addressed the issue of federal jurisdiction over wetlands. Status: On October 31, the court remanded to the district court, concluding that more fact-finding must occur before the district court can establish CWA jurisdiction over privately owned wetlands that are linked to tributaries of navigable rivers, and that the court should consider the Supreme Court’s dissenting opinion in *Rapanos*. [Author’s Note: The *Rapanos* case (126 S.Ct. 2208) was decided on June 19, 2006, and is summarized in this column in the October 2006 issue of the *Reporter*.]

NINTH CIRCUIT

Northern California River Watch v. City of Healdsburg, Case No. 04-15442. Appeal to the Ninth Circuit of a district court decision holding that the City violated the CWA by discharging sewage into waters of the U.S. without obtaining a NPDES permit. The body of water in question is known as “Basalt Pond,” and is a rock quarry pit that had filled with water from the surrounding aquifer and was located next to the Russian River. Issue was whether Basalt Pond qualifies as waters of the U.S. Basalt Pond is separated from the Russian River by a levee which varies between fifty and several hundred feet in width – there is no surface connection. Water from Basalt Pond drains into the surrounding aquifer and much of it ends up in the Russian River. Wetlands are considered “navigable waters” if the wetlands have a “significant nexus” to navigable-in-fact waterways. A significant nexus exists “if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’” Status: On August 10, the Ninth Circuit affirmed, concluding that Basalt Pond and its wetlands does “possess such a ‘significant nexus’ to waters that are navigable in fact, because the Pond waters seep directly into the navigable Russian River.” The court based its decision on Justice Kennedy’s “significant nexus” test in the *Rapanos* decision, which the Ninth Circuit concluded was the narrowest grounds on which the most justices agreed. 457 F.3d 1023. [Author’s Note: The *Rapanos* case (126 S.Ct. 2208) was decided on June 19, 2006, and is summarized in this column in the October 2006 issue of the *Reporter*. Also, a petition to review the Ninth Circuit’s decision has been filed with the U.S. Supreme Court. *See supra*.]

Baccarat Fremont Developers v. U.S. Army Corps of Engineers, Case No. 03-16586. Developer’s appeal of district court dismissal of challenge to Corps permit requiring the developer to create freshwater wetlands and maintain wetlands on the site. The court held that the CWA does not require the Corps to show a “significant hydrological or ecological connection” between the wetlands and adjoining lakes and streams to exercise its au-

thority. Status: The Court affirmed on October 14, 2006; motion for rehearing filed in light of the *Rapanos* decision, then-pending in the Supreme Court. [Author's Note: The *Rapanos* case (126 S.Ct. 2208) was decided on June 19, 2006, and is summarized in this column in the October 2006 issue of the *Reporter*.] Rehearing and rehearing *en banc* denied August 3; petition for review has been filed in the U.S. Supreme Court. *See supra*.

ELEVENTH CIRCUIT

United States v. Alabama Power Co., Case No. 06-15456. Appeal of a decision that the federal government used the wrong interpretation of what constituted an emissions increase in charging that Alabama Power violated New Source Review (NSR) by modifying power plants and increasing emissions without installing the required modern pollution controls. EPA interprets "emissions increase" as an increase in actual emissions measured on an annual basis. The company argued that "emissions increase" should be interpreted as an increase in the maximum potential hourly emissions rate. 37 ER 2118 (10/20/06). *See also, Duke Energy, su-*

pra. Status: The court issued a memorandum on October 24 questioning its own jurisdiction in the case. On November 14, the court granted a motion to stay this case until the U.S. Supreme Court reaches a decision in *Duke Energy, supra*.

State of Alabama v. U.S. Army Corp. of Engineers, Case No. 06-14211. State of Florida appeal of a Northern District of Alabama ruling denying the State's request for more water to be diverted to the Apalachicola River from Lake Lanier and other Georgia reservoirs in order to protect shellfish and other natural resources in Apalachicola Bay. Status: Motion to dismiss the appeal as moot granted November 14.

D.C. CIRCUIT

Minnesota Power v. EPA, Case No. 05-1246, and *North Carolina v. EPA*, Case No. 05-1244. Various petitions challenging EPA's Clean Air Interstate Rule (CAIR), which was issued March 10, 2005. The CAIR implements an emissions trading system to reduce emissions of sulfur dioxide and nitrogen oxides from power plants. Status: Petition filed July 11; proposed briefing format and sched-

ule filed by EPA on September 11. *Environmental Defense v. EPA*, Case No. 05-1159, and *Chesapeake Bay Foundation v. EPA*, Case No. 05-1267. Various petitions challenging EPA's March 15 rule allowing coal-fired power plants to avoid maximum achievable control technology (MACT) emissions controls for mercury. Status: Petition filed May 18, proposed briefing format and schedule was filed by EPA on August 29.

Stacy Watson May, stacy.watson-may@hklaw.com, received her J.D. from The John Marshall Law School in 1997. She practices in the Jacksonville and Orlando offices of Holland & Knight LLP.

Lawrence E. Sellers, Jr., larry.sellers@hklaw.com, received his J.D. from the University of Florida College of Law in 1979. He practices in the Tallahassee office of Holland & Knight LLP.

Susan L. Stephens, susans@hgslaw.com, received her J.D. from the Florida State University College of Law in 1993. She is of counsel at Hopping Green & Sams in Tallahassee.

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You may contact the certification staff liaison Alexzina Jackson, at ajackson@flabar.org or 850/561-5768, regarding eligibility, certification hours, or exam information.

DEP Update

by Regina M. Keenan, Associate General Counsel

State of Alabama v. U.S. Army Corps of Engineers, et al. (ACF), 90-CV-1331-Bowdre (N.D. Ala.)

On September 20, 2006, the court lifted the stay allowing parties to seek leave to amend in light of the September 5, 2006 U.S. Fish and Wildlife Service biological opinion ("BiOP") assessing the Corps' operation of federal structures on the Chattahoochee River. On October 4, 2006, the court granted Alabama and Alabama Power's motions to amend and denied Florida's motion to lift the stay for the contempt motions. On November 3, 2006, in *State of Alabama v. USACOE, et al.*, 06-14211-FF (11th Cir.), Florida's motion to dismiss the appeal as moot was granted and the district court's order was remanded for consideration and disposition.

Southeastern Federal Power Customers, Inc. v. Luis Caldera, et al. (ACF), 1:00-cv-02975-Jackson (D.C. Cir.), 06-5080, 06-5081 (D.C.)

On November 17, 2006, the Court filed an order amending the briefing schedule. Appellant's Initial brief is due February 1, 2007. On November 17, 2006, the Atlanta Regional Commission and other parties petitioned the Judicial Panel on Multi-District Litigation to transfer four pending cases to the D.C. District Court for consolidated multidistrict proceedings.

State of Florida v. U.S. Fish and Wildlife Service, et al. (ACF), 4:06-cv-00410-RH-WCS-Hinkle (N.D. Fla.)

On November 15, 2006, U.S. Fish and Wildlife Service (FWS) answered Florida's Complaint challenging the BiOP. On November 16, 2006, FWS filed a motion to transfer the case to the Northern District of Alabama.

State of Georgia v. U.S. Army Corps of Engineers, et al. (ACF), 2:01-cv-0026-Story (N.D. Ga.)

On November 6, 2006, the court entered an Order granting Alabama's and Florida's motions to intervene. On November 7, the court granted Alabama's motion for leave to file motion to consolidate this action with *State of Georgia v. USACOE, et al.*,

1:06-CV-1473-Pannell, Jr. (N.D. Ga.). The court indicated it would reconsider its previous denial of Alabama's motion to transfer proceedings. Argument is set for December 11, 2006.

Miccosukee Tribe of Indians v. EPA, et al., 04-21448-Civ-Gold/Simonton (S.D. Fla.)

The court has allowed the Tribe to depose a number of EPA employees in order to ensure the completeness of the federal administrative record relating to EPA's determinations concerning the Phosphorus Rule and 2003 Everglades Forever Act amendments. The Tribe must complete all discovery by December 31 and has until January 31, 2007, to file its request for supplementation of the federal administrative record based on documents and testimony received during the discovery process. The court has set a deadline of April 20, 2007 for the filing of motions for summary judgment and set oral argument on those motions for June 15, 2007.

Miccosukee Tribe of Indians v. EPA, et al., 88-01866-Civ-Moreno (S.D. Fla.)

On September 26, the parties filed their responses and/or objections to the Special Master's report. That report found, among other things, that past exceedances of water quality requirements in the Loxahatchee Refuge should not be excused as being due to error or extraordinary natural phenomena, but that no remedial action beyond those offered by the State Parties were necessary. On October 16, 2006, the court heard oral argument on the parties' responses and objections. The court is expected to issue a ruling within the next four to eight weeks.

Florida Disabled Outdoor Association, et al. v. DEP, 05-10073-Moore (S.D. Fla.)

Several disabled plaintiffs and associations for disabled persons alleged a failure to comply with the Americans With Disabilities Act (ADA) at the John D. Pennekamp Coral Reef State Park in the Florida Keys. In a settlement dated September 1, 2006, the Department agreed to make over

200 modifications to the park facilities and modify its statewide policies for the disabled.

Florida Power & Light v. DEP, 06-002871RP-Alexander (Fla. DOAH)

On November 14-17, 2006, a hearing was held on the challenge to portions of the proposed Clean Air Interstate Rule (CAIR rule). Petitioners object to the provisions of the rule that apply fuel adjustment factors to determine how many NOx credits a company will receive. Petitioners assert that the rule is an attempt to impose economic regulation beyond the scope of authority of Chapter 403, F.S., because the rule allegedly favors coal-fueled plants over fuel oil and natural gas plants.

DEP v. Coronet Industries, Inc.

The settlement agreement, finalized on October 16, 2006, requires a removal action involving Pond 6 at the Coronet site in Hillsborough County. Pond 6 has historically been the most contaminated pond on the site and the biggest threat to contaminating offsite surface and ground water. DEP, EPA, DOJ and Coronet will now begin negotiation of a federal consent decree that will address, comprehensively, the closure and remediation of the site.

DEP v. City of Ft. Lauderdale & Waste Management of Florida, Inc., CACE-03012923 (Fla. 17th Cir.)

DEP was seeking reimbursement of costs expended to assess and remediate off-site dioxin contamination related to the Wingate Road Municipal Incinerator & Landfill in Ft. Lauderdale. The City of Ft. Lauderdale paid \$200,000 in settlement and a stipulation of dismissal has been filed with the court.

DEP v. Eagle Roofing Products Florida, LLC, 2006 CA 001475 (Fla. 5th Cir.)

This case involves construction of a cement roofing tile manufacturing plant without an air construction permit. On October 17, 2006, parties entered a consent final judgment which prohibits any operational testing and

operation until Eagle obtains an air construction permit and requires the payment of \$500,000 in civil penalties and costs. Eagle has submitted an air construction permit application to the Southwest District.

Chapter 62-730, F.A.C., Rulemaking - Risk-based Corrective Action Requirements for hazardous waste facilities

The hazardous waste regulation section filed a certification package with the Secretary of State amending Chapter 62-730, F.A.C. The amendments, effective November 29, apply the risk-based corrective action requirements of Chapter 62-780, F.A.C., to cleanups at hazardous waste facilities.

Rules, 62-312.825 and 62-341.486, F.A.C. - General Permits to the

United States Army Corps of Engineers for Environmental Restoration or Enhancement

A new wetland resource general permit/environmental resource general permit has been created for specified environmental enhancement and restoration projects funded or conducted by the United States Army Corps of Engineers. These permits require notice to the Department and an affirmative Department confirmation of qualification with the terms and conditions of the general permit before work may commence. The permits include limitations and conditions that ensure that the authorized activities will not cause individual or cumulative adverse environmental impacts. The Department filed the rule on November 15, 2006, making it effective on December 5, 2006.

Rule 62-302.800, F.A.C. - Lower St. Johns River Site-Specific Alternative Criterion (SSAC)

Rule 62-302.800, F.A.C., setting site-specific alternative criterion for dissolved oxygen for the Lower St. Johns River, was effective on June 28, 2006 and approved by the EPA on October 10, 2006.

Chapter 62-302, F.A.C. - Triennial Review of Water Quality Changes

On September 28, 2006, the Environmental Regulation Commission approved proposed amendments to chapter 62-302, F.A.C., amending the state's surface water quality standards. The Department filed the certification package on November 17, 2006, with an effective date of December 7, 2006.

Environmental Justice Issues in a Post-Hurricane Context Explored at Workshop

A small but enthusiastic group of legal aid attorneys, law students, and citizen activists gathered in Pensacola on September 21 to confront issues facing Florida communities during post-hurricane rebuilding.

A joint project of Florida Legal Services and Access to Justice Subcommittee of the Public Interest Committee of the Environmental and Land Use Law Section of the Florida Bar, the workshop "Environmental Justice-- In the Aftermath: A Look at the Effect of Hurricanes on the Environment and Affordable Housing" aimed to bring awareness of disparity of environmental impacts to attorneys serving disadvantaged communities. Additionally, the workshop was an endeavor to provide those attorneys with tools needed to identify similar issues with their clients and to properly address them.

Featured speakers included Leslie Powell and Rocky Cabagnot of Legal Services of North Florida; Francine Ishmael of Citizens Against Toxic Exposure, Inc.; Howard Jones of Holley Action Group; Marilyn Kershner of Florida Community Loan Fund; Nicole Kibert of Carlton Fields, P.A.; Deborah Schroth of Florida Legal Services; Randall Webster of Sapient Consultant Group; and Jeanne Zokovitch of WildLaw. They touched on a number of topics, including disposal of construction debris, green building, and the inclusion of affordable housing in rebuilding efforts.

"I have never had such a good time listening to so much bad news," stated attorney Barbara Curbelo Cusack, who attended the program. "I am motivated to research more about these issues."

The Florida Bar Foundation underwrote the majority of the costs of the

CLE-accredited workshop, enabling participants to attend for a nominal fee. Plans are in the works to repeat the workshop in other locations.

Attorneys and law students with an interest in environmental justice are invited to visit the Florida Legal Services online training calendar (<http://www.floridalegal.org/Training/Calendar%20List.htm>) or the ELULS website (<http://www.eluls.org>) for further information on upcoming workshops as it becomes available. Other resources are available on the ELULS website, including basic information intended for practitioners outside of the environmental field and the general public. Want more? Membership in ELULS entitles you to access the online ELULS Treatise, with in-depth features on the full range of topics relevant to the Florida environmental attorney.

Coming Up In 2007... From the Affiliate Membership Chair

by J. Chris Herin, ELULS Affiliate Membership Chair

The affiliates are looking forward to several opportunities in early 2007 that are focused on helping the lawyers and affiliates get to know one another better. The first opportunity will be a social mixer in Tampa on the evening of January 25, which will be following an ELULS Executive Council meeting and will be associated with The Florida Bar's Continuing Legal Education (CLE) course entitled "Environmental & Land Use Considerations for Real Estate Transactions." Look for our advertisement to come out on this soon and please plan to attend! Following this will be two affiliate/lawyer-sponsored mixers associated with the 13th Annual Public Interest Environmental Conference in Gainesville on March 1, as well as with a CLE course entitled "2007 Hot Topics: Projects and Cases" in Ft. Lauderdale in late March. We may also add one or more mixers by mid-2007.

These lawyer/affiliate events have grown in popularity and are a great way for lawyers and affiliate members

to interact in a relaxed atmosphere. Also, these events are a good way for "prospective affiliates" to check out membership in the ELULS. We try to spread these events around the State of Florida and I would encourage you to invite "prospectives" to attend when our mixers are nearby. We have a few "land use-related" affiliate members and would especially like to see increased growth/participation in that portion of our membership. Please note that there are low-cost sponsorship opportunities associated with these events for affiliates and law firms which can provide good visibility. If you are interested in sponsorship, please let me know!

The affiliates have started planning for their portion of ELULS's August 2007 Annual Update in Amelia Island. Traditionally, the affiliates help organize (and provide speakers for) portions of the Annual Update having to do with technical and ethical issues. I would appreciate any thoughts you would like to provide on

specific topics and formats which the affiliates should consider for the 2007 Annual Update.

Please also note that our affiliate members have expressed a willingness to be a resource for lawyers on other fronts. For example, many affiliates routinely provide technical presentations (informational as well as for formal training) on a wide variety of topics. If you have a need for a speaker for a function on a particular technical topic, please check with us to see if the affiliates can meet your needs! Related to this, our affiliates are also looking for opportunities to co-author articles with lawyers for publication in venues such as The Florida Bar Journal. Our affiliate membership includes many excellent writers who are also technical leaders in their fields. Please let us know if you would like to work with an affiliate to co-author an article!

Chris Herin can be reached via email at CHerin@GeoSyntec.com and telephone at 561-922-1041.

Florida Minority Fellowship: A Partnership between The Florida Bar's Environmental and Land Use Law Section and the American Bar Association Section of Environment, Energy, and Resources

This program is designed to encourage minority law students and or underrepresented students to study and pursue careers in environmental and/or land use law and is open to first and second year law students. The program will fund one law student for a summer internship at a government agency or public interest organization in Florida for \$5,000.00. The Fellowship guidelines require an 8-10 week internship (40 hours per week) commitment wherein the recipient will work on legal matters for a government agency or a public interest organization in the fields of environment, energy, natural resources and/or land use law. In addition, each recipient will be expected to attend the Annual Update meeting of the ELULS and will be assigned a mentor from the Section to aid in the pursuit of a career in environmental and/or land use law.

If you know of students that may be interested please tell them about this program and direct them to the application materials available at <http://www.abanet.org/enviro/committees/lawstudents/2007minorityfellowship/florida.shtml>. Applications need to be postmarked or emailed by March 5, 2007 to Anna Steckel, ABA Section Environment, Energy, and Resources, 321 N. Clark St., Chicago, IL 60610, (312) 988-5625, Fax: (312) 988-5572, steckela@staff.abanet.org.

Law School Liaisons

A Winter '06 Update from the FSU College of Law

by Profs. David Markell, Donna Christie, J.B. Ruhl, and Robin Kundis Craig

This fall has been a productive one for FSU's Environmental and Land Use Law Program. We summarize below some recent activities and accomplishments. We invite ELULS members to join us for our spring *Environmental Forum*, which is set for April 4 and will focus on Florida's Affordable Housing Crisis. Please check the College of Law Environmental Events page in the spring for more details.

Our Fall Environmental Forum

Our November 2006 *Environmental Forum*, which the College of Law co-sponsored with the ELULS, focused on **The Role of Marine Reserves in a Fisheries Management Strategy**. Marine reserves are essentially ocean "wilderness" areas: all extractive and disruptive activities are prohibited within a reserve. These reserves have proved controversial. While some people tout marine reserves based on the benefits they bring to ecosystems and fishery populations, fishermen, among others, have expressed concerns that the use of such reserves is not sufficiently supported by science to justify the complete closure of areas to such important economic use. The details of reserves have proved challenging as well. Scientists have been working diligently on issues of size and location to determine how marine reserves can be used optimally. Our fall *Forum* featured leading experts on the topic, including: Professor Felicia Coleman, Director of the FSU Coastal and Marine Laboratory, a Pew Marine Conservation Fellow and an Aldo Leopold Leadership Program Fellow; Professor Robin Craig, Attorneys' Title Insurance Fund Professor, FSU College of Law; Charles Shelfer, Deputy General Counsel, Florida Fish and Wildlife Conservation Commission; and David White, Director, South Atlantic regional office of The Ocean Conservancy (TOC). Professor Donna Christie, a leading authority on legal issues surrounding ocean and coastal management law

and policy, moderated the program, and Lauren Moody, President of the FSU Environmental Law Society, introduced the program.

FSU's Environmental Law Society

Our student-run Environmental Law Society (ELS) has been extraordinarily productive this fall. The ELS sponsored a standing-room only brown bag lunch that featured Ralph DeMeo, of Hopping Green & Sams. Ralph did a terrific job of discussing the use of experts in environmental litigation. The ELS has also organized a "Commuter Choices" campaign, as part of the National Association of Environmental Law Societies' Campus Climate Neutral campaign.

Recent FSU College of Law faculty scholarship

Donna Christie and her co-authors have published the 3rd West edition of the Coastal and Ocean Law casebook. The 3rd edition of Coastal and Ocean Management Law in a Nutshell will be out early in 2007. Her article, *Living Marine Resources Management: A Proposal for Integration of United States Management Regimes*, 34 ENVIRONMENTAL LAW 107, was recently chosen one of the country's top ten land use and environmental law articles for 2005 and reprinted in 37 LAND USE AND ENVIRONMENT LAW REVIEW (2006). Other recent articles include: *Implementing an Ecosystem-Approach to Ocean Management: An Assessment of Current Regional Governance Models*, 16 DUKE ENVIRONMENTAL & POLICY FORUM 117 (2006) and *A Tale of Three Takings: Taking Analysis in Land Use Regulation in the United States, Australia and Canada*, 32 Brooklyn Journal of International Law (forthcoming 2007).

J.B. Ruhl co-authored two recent publications with **Jim Salzman** (Duke): *In Defense of Regulatory Peer Review*, 84 WASHINGTON UNIVERSITY LAW REVIEW 1 (2006) and "The Effects of Wetlands Mitigation Banking on

People," *National Wetlands Newsletter*, Mar.-Apr. 2006, at 1, 9-14 (2006). J.B. and **John Nagle** (Notre Dame) also came out with the second edition of THE LAW OF BIODIVERSITY AND ECOSYSTEM MANAGEMENT (Foundation Press University Casebook Series, 2006). J.B. has also finished work on THE LAW AND POLICY OF ECOSYSTEM SERVICES (Island Press) (with Steve Kraft and Chris Lant), which is due out in May 2007.

Robin Kundis Craig's recent articles include: *Coastal Water Quality Protection*, in OCEAN AND COASTAL LAW (Donald C. Baur, Timothy Eichenberg & Michael Sutton, Eds. (ABA: forthcoming April 2007)), *Urban Storm Water Runoff and the Oceans*, 21:4 NATURAL RESOURCES AND THE ENVIRONMENT (forthcoming Spring 2007), *The Role of Use Competition and Scarcity in the Protection of Coastal Ecosystem Services*, 21:1 JOURNAL OF LAND USE & ENVIRONMENTAL LAW (forthcoming Spring 2007), "Marine Protected Areas and the United States' Ocean Policy and Law," 38:3 *Trends* (ABA SEER) (forthcoming Jan./Feb. 2007), *Are Marine National Monuments Better Than Marine National Sanctuaries? U.S. Ocean Policy, Marine Protected Areas, and the Northwestern Hawaiian Islands*, 7:1 SUSTAINABLE DEVELOPMENT LAW & POLICY (forthcoming Fall 2006) (invited article), *Total Maximum Daily Load*, in ENCYCLOPEDIA OF WATER SCIENCE (Stanely W. Trimble, ed.) (forthcoming Fall 2006), *Urban Runoff and Ocean Water Quality in Southern California: What Tools Does the Clean Water Act Provide?* 9 CHAPMAN LAW REVIEW 313-363 (Spring 2006).

David Markell's recent articles include: *Understanding Citizen Perspectives on Government Decision-Making Processes as a Way to Improve the Administrative State*, 36 ENVIRONMENTAL LAW 651 (2006), and "Slack" in the Administrative State and its Implications for Governance: the Issue of Accountability, 84 OREGON LAW REVIEW 1 (2005). The 5th edition of the leading environmental law casebook

continued...

LAW SCHOOL LIAISONS

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for which Prof. Markell is a co-author, ENVIRONMENTAL PROTECTION: LAW AND POLICY (Glicksman, Markell, Buzbee,

Mandelker, and Tarlock) (Aspen Law & Business), is due out in 2007. Other publications scheduled for publication in 2007 include COMPLIANCE & ENFORCEMENT: TOWARD MORE EFFECTIVE IMPLEMENTATION OF ENVIRONMENTAL LAW (PROCEEDINGS OF THE 4TH IUCN ACADEMY

OF ENVIRONMENTAL LAW COLLOQUIUM) (Cambridge Univ. Press) (co-editor), and *Is there a Possible Role for Regulatory Enforcement in the Effort to Value, Protect, and Restore Ecosystem Services?*, 21 JOURNAL OF LAND USE AND ENVIRONMENTAL LAW __ (2007).

University of Florida Update: An Active Spring Schedule

by Alyson Flournoy

As the fall semester draws to a close, we wanted to share with you some recent news as well as outline the busy spring semester schedule of environmental and land use law programs at UF. We welcome your participation. Please contact elulp@law.ufl.edu for more information on any upcoming events.

Faculty Update

The ELUL faculty began a new tradition this fall, challenging the students to volleyball, croquet, and bocce in an Environmental Law(n) Sports Afternoon. The students defeated the faculty in 2 games of volleyball, but the faculty bested the students in croquet. Bocce was postponed for another day when faculty expert Mary Jane Angelo could participate. Everyone enjoyed the pizza afterwards.

In addition to teaching, writing, and not practicing their volleyball skills, UF faculty have been traveling around the state and country to speak on a variety of topics in the past few months. Recent presentations include:

Mary Jane Angelo

"Rapanos, Carabell and Beyond," Florida Wetlands Conference (November 17), Tampa.

Tom Ankersen

"Vamos a la Playa: Comparative Beach Access Law," at Sustainable Tourism and Coastal Development, University of Costa Rica College of Law (December 1), San Jose, Costa Rica.

Conference Co-Chair & Panel Presenter, "Anchoring (and mooring) Away: Government Regulation and Rights of Navigation in Florida", From Stem to Stern: Boating and Waterway Management in Florida, Florida Fish and Wildlife Conservation Commission, Florida Sea Grant, University of Florida Levin College

of Law (November), Cocoa Beach.

"Preservation of Recreational and Commercial Working Waterfronts," Planning in Paradise: The Squeeze is On, Florida Chapter of the American Planning Association State Conference (September 27-30), Marco Island.

"Changing Waterfronts; Changing Communities," National Sea Grant Fisheries Extension Meeting (Oct. 15-18), Atlantic Beach.

Alyson Flournoy

"Wetlands Conservation and Metropolitan Growth: A Look at the Landscape and Some Predictions after Rapanos and Carabell," Georgia State University Center for the Comparative Study of Metropolitan Growth (November 16), Atlanta, GA.

Christine Klein

"The Law of the Lakes: From Protectionism to Sustainability in the Great Lakes Water Basin," Institute for Trade in the Americas, Michigan State University College of Law, Second Annual Conference on Trade and Investment in the Americas (Dec. 1, 2006), Chicago, IL.

Student Publications

An article titled "Influence of Carcinogenicity Classification and Mode of Action Characterization on Distinguishing 'Like Products' Under Article III 4 of the GATT and Article 2.1 of the TBT Agreement" written by third year student Todd Stedeford, who also has his Ph.D. in Toxicology and Risk Assessment and is a Diplomat of the American Board of Toxicology, will be published in the NYU Environmental Law Journal next year.

Upcoming Events

UF will host its two annual envi-

ronmental and land use law related conferences this spring – the Richard E. Nelson Symposium and the Public Interest Environmental Conference – in addition to hosting four visiting lecturers for the spring Environmental Speaker Series. We are also holding a special roundtable meeting at UF to bring together environmental law scholars from around the country and UF faculty with expertise in a wide array of relevant disciplines, to discuss the next generation of environmental laws.

The PIEC is co-sponsored by the Public Interest Committee of the ELUL Section. The Environmental Speaker Series is made possible by support from the ELUL Section, Hopping Green & Sams, P.A., and Lewis Longman & Walker, P.A. Brief descriptions of each of these events follow.

Richard E. Nelson Symposium in Local Government Law

Date: 2/2/07

Location: UF Hilton, Gainesville FL

Topic: *From Fairways to Driveways: Implications of Golf Course Conversions*

Speakers: Robert Banks, Palm Beach County; Professor Eric R. Claeys, St. Louis Univ.; Professor Nancy A. McLaughlin, University of Utah; Dennis D. Mele, Ruden McCloskey; Professor Patricia E. Salkin, Government Law Center, Albany Law School; Thomas D. Shults, Kirk-Pinkerton, P.A.; James T. Snow, United States Golf Association; Ronald L. Weaver, Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A.; Steven Wernick, Levin College of Law, J.D. Class of 2007; and Professor Michael Allan Wolf, Levin College of Law.

Description: The Sixth Annual Richard E. Nelson Symposium will

assemble an unprecedented panel of experts to discuss the legal aspects of a growing phenomenon in Florida and throughout the nation - the conversion of existing golf courses into more intensive land uses. In many communities experiencing intense growth pressures, golf courses are being targeted for residential, commercial, and mixed-use projects. Symposium presenters, will survey national trends in golf course conversions; review the pertinent case law; explain the perspectives of, and special challenges facing, attorneys representing developers, neighbors, and local governments; debate the legitimacy of the use of eminent domain to take a golf course; explore relevant conservation easement and covenant law concepts; discuss the environmental aspects of golf course operations and conversions; and highlight special Florida law concerns. This program will be of interest to attorneys representing local governments, neighborhood associations, real estate developers, golf course owners, and environmental groups.

Registration and Information: Contact Barbara DeVoe at devoe@law.ufl.edu.

Public Interest Environmental Conference

Date: 3/1 – 3/3/07

Location: UF Levin College of Law
Topic: Talk, Technology & Techniques: Game Plan for Green

Speakers: Keynote Speaker – Ray Anderson, Founder and Chairman of Interface, Inc.; Invited Speaker for Kick-off Reception: Hunter Lovins, President and Co-Founder Natural Capitalism, Inc. Other confirmed plenary speakers include Professor David Driesen, Syracuse Law School; Professor Charles Kibert, UF School of Building Construction and Design; Professor J.B. Ruhl, FSU School of Law; Professor Joe Tomain, University of Cincinnati Law School.

Description: The conference will feature three tracks: Green Design, Green Infrastructure, and Green Institutions. Many of the conference panels will emphasize sustainability. Panel topics include sustainable architecture, low-impact development, greening historic preservation, rural stewardship, high-

ways, greening the media, ecosystem services, green building, and greening government, the media, corporations, and education. The UF Leadership Development Institute will sponsor our keynote speaker and help to coordinate the ever-popular Saturday morning skills workshop.

This year, the conference will be held in the new facilities at the Levin College of Law for the first time.

Registration and Information: You can register now at www.ufpic.org. A detailed agenda will be online in early January.

Next Generation Environmental Law Roundtable Meeting

Date: 3/1/07

Location: UF Levin College of Law
Topic: Identifying the Challenges and Opportunities for the Next Generation of Environmental Laws

Participants: David Adelman, Univ. of Arizona Law; Janaki Alavalapati, UF Forest Resources and Conservation; Mary Jane Angelo, UF Law; Alyson Flournoy, UF Law; Tom Ankersen, UF Law; John Applegate, Univ. of Indiana Law; Mark Brown, UF Environmental Engineering; Margaret Carr UF Landscape Architecture; David Driesen, Syracuse Law; Richard Hamann, UF CGR; Christine Klein, UF Law; Tom McGarity, Univ. of Texas Law; Christine Overdeest, UF Sociology; Sid Shapiro, Wake Forest Law; Rena Steinzor, University of Maryland Law; Joe Tomain, University of Cincinnati Law; Jeff Wade UF CGR; Wendy Wagner, Univ. of Texas Law; Michael Wolf, UF Law.

Details: This roundtable meeting is a scoping meeting funded by a seed money grant from the UF School of Natural Resources and the Environment. The meeting will bring together scholars from an array of disciplines to identify the challenges and opportunities to which our next generation of environmental laws must respond, and to develop proposals for further interdisciplinary research on the subject.

Environmental Speaker Series

This year's environmental speaker series brings four outstanding speakers from around the country to UF to talk on topics related to Conserva-

tion Techniques, and features a joint presentation by a UF faculty member and J.D. student. Section members are invited to join UF faculty and students at all seminars. Because space is limited, please contact Lena Hinson at elulp@law.ufl.edu to reserve a seat. All presentations are 3-5 pm in the Faculty Dining Room, Bruton-Geer Hall.

January 18

Alyson Flournoy

UF Foundation Research Professor & Director, ELULP

Christina Storz

UF Candidate for J.D. and Masters in Interdisciplinary Ecology

The National Environmental Legacy Act: A New Tool for Conservation

Michael Wolf (commenter)

UF Professor & Richard E. Nelson Chair in Local Government Law

February 8

Bob Irvin

Senior Vice President of Conservation

Defenders of Wildlife

Reauthorization of the Endangered Species Act: The Debate Over Critical Habitat

February 15

J.B. Ruhl

Matthews & Hawkins Professor of Property
FSU Law

Making the Common Law Ecological: Using Ecosystem Services to Make the Common Law a Technique of Conservation

February 22

Amy Sinden

Associate Professor of Law
Temple University Law

March 29

Marc Mihaly

Acting Assoc. Dean for the Environmental Program, Acting Director, Environmental Law Center, & Associate Professor of Law

Vermont Law School

Public / Private Development as a Conservation Technique

Florida Coastal School of Law Launches New Environmental Law Program

Florida Coastal Adds Two Full-Time Professors to its Environmental and Land Use Law Faculty

In August 2006, Professors Randall S. Abate and Michael Lewyn joined the Florida Coastal School of Law (FCSL) faculty. Professor Abate joins the FCSL faculty with twelve years of full-time law teaching experience at Vermont, Widener-Harrisburg, and Rutgers-Camden, where he taught several environmental law courses and coached environmental moot court teams to three national championships. Professor Abate teaches Environmental Law Concepts, Environmental Law Practice and Procedure, International Environmental Law, Ocean and Coastal Law, and Global Climate Change Seminar. His most recent articles on environmental law topics appeared in 2006 in the *Columbia Journal of Environmental Law* and the *Cornell Journal of Law and Public Policy*.

Professor Lewyn joins the FCSL faculty with eight years of full-time law teaching experience at George Washington, Southern Illinois, Rutgers-Camden, John Marshall (Atlanta), and Miami. Professor Lewyn teaches

Urban Sprawl, Property, and Products Liability. He is widely published on the law of urban sprawl and his most recent article on this topic appeared in 2006 in the *Quinnipiac Law Review*. In December, he spoke in Bloomington and Indianapolis, Indiana as part of the Indiana Urban Planning Scholar Presentation Series, sponsored by the Indiana chapter of the American Lung Association and numerous other organizations. The presentation addressed the relationship between land use regulation and suburban sprawl.

Florida Coastal Hosts Eighth Annual Northeast Florida Environmental Summit

On November 3, 2006, FCSL hosted its largest-ever Environmental Summit. Approximately 140 attendees heard presentations from leaders in environmental law, science, and policy. The keynote speaker was Brian O'Neill, Esq., Partner at Faegre & Benson in Minneapolis, Minnesota, and lead plaintiffs' counsel in the ongoing Exxon Valdez litigation. Other

distinguished speakers included Professor John Dernbach (Widener-Harrisburg), Professor Allison LaPlante (Lewis and Clark), and Patty Martin (former mayor of Quincy, Washington whose crusade against hazardous waste in fertilizers was chronicled in the national bestseller, *Fateful Harvest*). The Summit covered a wide range of timely topics in the environmental law field including climate change, sustainable development, green buildings, biofuels, and wetlands.

Florida Coastal Faculty Approves New Environmental Law Certificate Program

In December 2006, the FCSL faculty approved a new Environmental Law Certificate program, which will graduate its first candidates in May 2007. The 15-credit certificate program requires students to complete classroom credits, a skills component, and an advanced writing requirement component in environmental law courses. An environmental law externship program is currently being developed.

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- Workers' Compensation

Additional topics available upon request.

There is no fee for this service.

To arrange for a speaker for your group, contact:

Gail Grimes, The Florida Bar Speakers Bureau, 651 East Jefferson Street,
Tallahassee, FL 32399-2300, 850/561-5767, or ggrimes@flabar.org.

APPLICATION

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that exceeds groundwater cleanup target levels (GCTLs). Cleanup target levels are defined in Chapter 62-770, F.A.C. Application of ICs typically follow removal of contaminant sources (e.g., fuel or solvent storage tanks, pesticide mix/load structures, waste piles) and discontinuation of practices that have the potential to negatively impact site soils and groundwater.

Site assessment and cleanup strategy evaluations must be completed prior to planning ICs. Site assessment tasks typically include: use of risk assessment and statistical methods (e.g. calculation of 95% upper confidence limits considering contaminant additivity and apportionment); development of site-specific background levels or alternate cleanup target levels; speciation of carbon chains; soil analyses using the synthetic precipitation leaching procedure; and calculation of threshold equivalency values for some contaminants. De minimis or interim source removal actions may be required to justify application of ICs regarding remaining impacts.

The Florida Department of Environmental Protection (FDEP) is responsible for determining if technical and rule requirements will allow a site to be closed using ICs. The FDEP site/project manager determines what restrictions must be in place to protect human health and the environment. During negotiations, the property owner, the person responsible for site rehabilitation (PRSR) or their attorney, and the FDEP manager must discuss the appropriate ICs, review guidance regarding the planned control(s), and plan a draft of the IC document. A copy of FDEP's "Institutional Control Procedures Guidance Document", which is available on FDEP's website, should be used as a guide for preparing the IC documents.

Information on existing sites with ICs can be reviewed using the FDEP's IC Registry. The Registry is an internet mapping service that serves as the public's and local government's mechanism for monitoring ICs. The

website uses ArcIMS software to locate and identify IC sites in the State, with tools for searching by county, zip code or section, township and range. The Registry – which is updated periodically – can be found at <http://www.dep.state.fl.us/waste/default.htm>, and also includes sites from designated Brownfields, petroleum cleanup, dry-cleaning solvent cleanup, Superfund, RCRA/HSWA and non-program sites (State enforcements and voluntary cleanups).

The FDEP project manager is responsible for ensuring that all appropriate documentation, including an unsigned draft of the IC, technical and legal documents and supporting documentation, is provided to the FDEP's Office of General Counsel (OGC) in Tallahassee for review, approval and signature. The OGC should only receive the request for legal review of ICs directly from FDEP staff and not from the property owner or his/her representative.

ICs must be approved by the FDEP following a 30-day public notice period, and after verified notice is provided to local governments with jurisdiction over the property where the site is located. If the ICs are established for a groundwater use prohibition, one year of groundwater monitoring is required before a Site Rehabilitation Completion Order (SRCO), also known as a No Further Action Order, with conditions, is provided.

Original RCs must be filed by the property owner and the appropriate County land records office. The prop-

erty owner is responsible for all filing fees. A copy is kept with Master ICs in Tallahassee. FDEP enters the site information in the Registry after the PRSR presents proof of recording. Because the ICR is used as a critical tracking database for RC enforcement, audits, etc., the PRSR should be certain that the site information is correct. Because ICs are typically tied to the property and are generally a part of the title to the property, all original documents referenced must be kept on file with the FDEP and not destroyed pursuant to any other record keeping guidelines.

In order to remove an IC, the current property owner must submit a written request to the appropriate program and District office of FDEP. Acceptable reasons to remove an IC include: contamination no longer exceeds SCTLs or GCTLs based on recent sampling data, or the site remains contaminated but the property owner has committed to cleaning up contamination.

Andrew Lawn is a Florida-registered Professional Geologist with a Master of Science degree from the University of South Florida. He is a Senior Hydrogeologist and Office Manager of HSW Engineering, Inc. (HSW) in Orlando with 20 years of experience with complex hydrogeologic projects, specializing in environmental site assessments and restoration, emergency response, regulatory compliance, and permitting. He can be reached at 407-872-6893 or ALawn@HSWEng.com.

Internet Mailing List

Joe Richards, Internet Committee chair

Don't forget to update your listing on the Section's Internet mailing list. Anytime you change your e-mail address you need to let us know or you will miss out on enlightening legal discussions, case news and legislative updates as well as Section news and events. Additionally, the listserv is the first and best source of information (including access info) on the new online Environmental and Land Use Law Treatise. All this is provided right to your desktop when you are a subscriber. To update your information or to join for the first time go to www.eluls.org.

Mark your calendar for upcoming CLE events...



March 30

Hot Topics: Projects & Cases
Seminole Hard Rock Hotel
Hollywood

August 23-25

ELULS Annual Update
Amelia Island Plantation

Registration information, when available, will be posted at www.eluls.org.

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